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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES THOMAS SMITH, Defendant and Appellant.	H034482 (Monterey County Super. Ct. No. SS080708A)

Defendant James Thomas Smith was convicted after jury trial of battery by a prisoner on a nonprisoner (Pen. Code, § 4501.5).[1] The jury found defendant not guilty of battery by a prisoner on a prison employee by gassing (§ 4501.1). The trial court found true allegations that defendant had one prior strike (§ 1170.12), and that he had served six prior prison terms (§ 667.5, subd. (b)). After denying defendant's motion for new trial and request to strike the prison priors, the court sentenced defendant to 12 years in prison.

On appeal, defendant contends that: (1) because he was acquitted of a crime based on all of the same essential elements contained in the battery count, a judgment of acquittal must be entered; (2) the interplay of the prosecutor's argument and the instructions created a reasonable likelihood the jury convicted him of unintentional

[1] All further statutory references are to the Penal Code.

conduct; and (3) the court erred when it imposed the middle term. As we find no reversible error, we will affirm the judgment.

BACKGROUND

Defendant was charged by information with battery by a prisoner on a nonprisoner (§ 4501.5; count 1), and battery by a prisoner on a prison employee by gassing (§ 4501.1; count 2). The information further alleged that defendant had one prior strike (§ 1170.12, subd. (c)(1)), and that he had served six prior prison terms (§ 667.5, subd. (b)). Prior to trial, defendant filed a request that the court strike the prior strike and the People filed opposition. Following a hearing, the court denied the request.

The Prosecution's Case

Around 10:10 p.m. on October 1, 2007, Correctional Sergeant Jason Cowan directed Correctional Officers Terry Hansen, Robert Ries, and Lorenzo Nino to transport defendant, an inmate, in a van from the south facility to the central facility of the prison. Sergeant Cowan had learned that defendant was involved in a physical altercation and that defendant's safety could be in jeopardy. Defendant was wearing waist restraints when the officers arrived at the south facility. Sergeant Cowan first directed Officer Hansen to take a urine sample from defendant, because Sergeant Cowan smelled alcohol on defendant's breath and he suspected that defendant was under the influence of alcohol. Defendant then refused to get in the van, so the officers picked him up and placed him inside the van. During the transport, defendant cursed and threatened Officers Hansen and Ries, he kicked the inside wall and door of the van, and he said that he would not go.

Because of defendant's behavior, when they arrived at the central facility, Sergeant Cowan ordered that leg restraints be put on defendant. Officer Hansen ordered defendant to allow the officer to place him in ankle restraints. At first defendant did not comply, but he complied after being ordered to do so a second time. The officers moved defendant inside the central facility. While walking down a hallway, defendant continued his verbal threats and jerked his body from side to side, trying to break free from the

officers. When defendant tried to drop to the floor, the officers caught him and stood him back up. Defendant continued this behavior from the entrance of the building to the door of the housing unit, a distance of about 25 to 30 yards. Before entering the unit, the officers leaned defendant up against the wall and talked to him while he cursed at them and tried to push them away. When he calmed down, they all went inside the housing unit and took an elevator to the second floor. As they approached a holding cell, defendant began thrashing about, pushing against the officers, trying to break free, and cursing again. The officers walked defendant to the hallway wall, put him up against it, held him there, and talked to him.

After the officers calmed defendant back down, they walked him inside the cell. Defendant stood with his back to Officer Hansen so that the officer could remove defendant's restraints. Defendant then stepped forward, spun around, said "fuck you, Hansen," and spit in the officer's face. The spittle hit Officer Hansen on his cheek, chin, and closed lips. The officer stepped back and asked for a swab to collect the spittle. He then went to the nurse's station to be checked for any open wounds that the spittle could have entered.

The Defense Case

Officer Ries testified that defendant was extremely agitated when he was placed in the van and while being transported. Leg restraints were put on defendant when they arrived at the central facility because defendant was kicking the inside of the van. Inside the central facility, defendant was "resistive"; he violently twisted from side to side, dropped his weight, and tried to kick his feet out. When they got to the holding cell, after Officer Hansen removed defendant's waist restraints, defendant took two steps in, immediately turned around, said "fuck you, Hanson," and spit on him. Ries saw spittle on Officer Hansen's glasses and running down his face.

Defendant testified in his own behalf. He admitted the following prior convictions: a 1993 felony conviction for grand theft auto, a 1995 felony conviction for

theft, a 1996 conviction for robbery, a 1999 felony conviction for theft, and a 2001 felony conviction for theft. He also admitted that he had drunk about three glasses of "pruno" beginning about two hours before the correctional officers came to transport him on October 1, 2007, and that he was not sober when the officers arrived. About 10 minutes before the officers arrived, defendant sustained some injuries when another inmate assaulted him in the bathroom. When the officers arrived, they put defendant into a cell before putting him into the van. Defendant became upset when the officers told him that, for his safety, they were taking him to administrative segregation, which is where an inmate is taken for disciplinary actions. Defendant knew that he would lose his prison job, some custody credits, and his security level as a result of being taken to administrative segregation, and he did not understand why he was being taken there. He thought it was unfair. He told the officers that he did not want to go, using profanity. After the officers took a voluntary urine sample from him, the officers forcibly put him in the van against his will.

Defendant did not threaten any of the officers while being transported to the central facility, but he did kick the inside of the van. After the officers put the leg restraints on him, he could not move very fast. Inside the central facility, the officers lifted him up and carried him down the hallway because he was not moving fast enough. He felt humiliated and became agitated because the officers would not let him walk on his own, and he tried to get his feet back on the ground. He made several verbal threats against the officers, but he did not try to physically assault them. After he voluntarily entered the cell, and the restraints were removed, Officer Hansen made some comment to him that defendant felt was unnecessary. Defendant turned around, took a deep breath, and said "fuck you, Hansen." However, when he pronounced the "f," he accidentally sprayed Officer Hansen in the face with saliva. He did not intend to spit on the officer.

Verdicts, Motion for New Trial, and Sentencing

On May 20, 2009, defendant waived his right to a jury trial on the alleged priors. On May 21, 2009, the jury found defendant guilty of count 1 (battery by a prisoner on a nonprisoner; § 4501.5), and not guilty of count 2 (battery by a prisoner by gassing; § 4501.1). The court found that defendant had a prior strike (§ 1170.12, subd. (c)(1)), and that he had served six prior prison terms (§ 667.5, subd. (b)).

On July 7, 2009, the People filed a sentencing recommendation, requesting that the court sentence defendant to 12 years in state prison. On July 10, 2009, defendant filed a motion for new trial and a request that the court strike all the prison priors. At the sentencing hearing on July 15, 2009, the court denied the motion for new trial and the request to strike the prison priors. It then sentenced defendant to 12 years in prison, the sentence consisting of six years for the new offense, double the middle term, plus one year consecutive for each of the six prison priors.

DISCUSSION

Inconsistent Verdicts

As he did in his motion for new trial below, defendant contends here that a judgment of acquittal must be entered on count 1 because the jury acquitted him of count 2 based on all of the same essential elements. "A true finding for each of the elements of the crime for which [defendant] was acquitted, i.e., gassing[,] was necessary to sustain the battery conviction. The only additional element to the gassing charge was that [defendant] intentionally spit at Officer Hansen. If the jury found this element had not been proven, there could be no offensive touching, and thus no battery conviction."

The People contend that the jury's acquittal of defendant on count 2 does not require an acquittal on count 1. "Here, the jury's verdicts may be explained by lenity, compromise or mistake, none of which undermine the validity of the conviction. Moreover, the prosecutor advised the jury that the two counts were 'charged in the

alternative,' " and "[t]he jury could have found battery without finding intentional spitting on Hansen."

When a defendant contends that the jury has rendered inconsistent verdicts, we independently review the record to determine whether there is sufficient evidence to support the convictions and findings rendered by the jury, and whether a reversal is warranted. (*People v. Lewis* (2001) 25 Cal.4th 610, 656 (*Lewis*).) In this case, the prosecutor informed the jury during closing argument that the two counts charged against defendant were "charged in the alternative." Section 954 provides in part: "An accusatory pleading may charge . . . different statements of the same offense . . . under separate counts. . . . An acquittal of one or more counts shall not be deemed an acquittal of any other count."

People v. Santamaria (1994) 8 Cal.4th 903 explained: "It is . . . settled that an inherently inconsistent verdict is allowed to stand; if an acquittal of one count is factually irreconcilable with a conviction on another, . . . effect is given to both. [Citations.] When a jury renders inconsistent verdicts, 'it is unclear whose ox has been gored.' [Citation.] The jury may have been convinced of guilt but arrived at an inconsistent acquittal . . . 'through mistake, compromise, or lenity . . . .' [Citation.] Because the defendant is given the benefit of the acquittal, 'it is neither irrational nor illogical to require [him or] her to accept the burden of conviction on the counts on which the jury convicted.' [Citations.]" (*Id.* at p. 911; accord, *Lewis*, *supra,* 25 Cal.4th at p. 656.)

Section 954 would seem a complete answer to defendant's claim in that it allows for acquittal on one or more counts that are "different statements of the same offense." But defendant argues, quoting *People v. Hamilton* (1978) 80 Cal.App.3d 124 at page 130 (*Hamilton*), that "[t]here is an exception to this rule: [¶] . . . 'where all of the essential elements of the crime of which the defendant was acquitted are identical to some or all of the essential elements of the crime of which he was convicted, and proof of the crime of which the defendant was acquitted is necessary to sustain a conviction of the crime of

which the defendant was found guilty.' " In *Hamilton*, a jury found the defendant guilty of felony hit-and-run driving, but not guilty of engaging in a speed contest and of engaging in an exhibition of speed. (*Id*. at p. 127.) The appellate court found that "the verdicts of acquittal on the two speed offenses do not bring [the defendant] within the narrow judicial exception to section 954 . . . . The essential elements of engaging in a speed contest or engaging in an exhibition of speed are not identical to the essential elements of felony hit-and-run driving. Such an inconsistency is permissible under section 954 . . . ." (*Id*. at pp. 130-131.)

As the People note, *People v. Pahl* (1991) 226 Cal.App.3d 1651, has called into question whether precedent supports the *Hamilton* court's broad statement of the exception to section 954. In *Pahl*, the defendant was convicted by a jury of sexual battery but acquitted of false imprisonment. (*Id*. at p. 1656.) The appellate court found that the limited judicial exception discussed in *Hamilton* did not apply to the defendant in the case before it. (*Id*. at pp. 1659-1660.) The exception does apply in conspiracy cases, when the jury finds a defendant guilty of conspiracy but acquits the defendant of every crime charged in furtherance of the conspiracy. (*Id*. at p. 1657; citing *In re Johnston* (1935) 3 Cal.2d 32 (*Johnston*); see also, *Hamilton, supra*, 80 Cal.App.3d at p. 130.) While we are bound by *Johnston*, we agree with the *Pahl* court that we are not required to extend *Johnston* beyond its facts and setting in conspiracy law. (*Pahl, supra*, 226 Cal.App.3d at p. 1659.)

Even *Johnston* recognized that section 954 means "that a verdict apparently inconsistent shall afford no basis for reversal where the evidence is sufficient to support the conclusion that the defendant is guilty of the offense of which he stands convicted." (*Johnston, supra*, 3 Cal.2d at p. 36; accord, *People v. Lewis*, *supra*, 25 Cal.4th at p. 656.) Defendant does not contest the sufficiency of the evidence to support the jury's conclusion that defendant, a prisoner, committed battery on a nonprisoner as alleged in count 1, and we conclude that substantial evidence supports the jury's verdict. The

record supports a finding that defendant was a prisoner when he willfully touched Officer Hansen, a nonprisoner, in a harmful or offensive manner, either directly or indirectly. (See CALCRIM No. 2723.) We see no basis for allowing the jury's verdict on count 2 to upset the jury's verdict on count 1.

The Prosecutor's Argument

The court instructed the jury as to count 1 with CALCRIM No. 2723. That instruction told the jury in part that, to prove defendant guilty of that charge, "the People must prove the following: One, that the Defendant willfully touched Terry Hansen in a harmful or offensive manner; two, when he acted, the Defendant was serving a sentence in a California State Prison, and three, that Terry Hansen was not serving a sentence in a State prison. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage. [¶] The slightest touching can be enough to commit a battery if it is done in a rude or angry way. . . . The touching can be done indirectly by causing an object to touch the other person."

The prosecutor argued in part to the jury that, as to count 1, "[t]he People must demonstrate through the presentation of their evidence that the Defendant touched another individual who was a non-prisoner, and that would be Officer Hansen, in a rude or angry manner. And it can be the slightest touching.

"This touching doesn't have to cause pain or injury of any kind, and the touching can be through a person's clothing. The actual skin is not required to have been touched in this particular crime. The touching must be willfully accomplished, which is also part of the definition of this particular crime. And willfully, as the court has instructed you, means that it was done willingly or on purpose. And that's the simplest way to describe it, that it was done on purpose and willingly.

"The touching can be done indirectly by causing an object to touch another person. And as it applies to the facts in this case, we don't have a situation where the Defendant

has reached out and grabbed an individual or punched an individual, but has actually caused, in this case, another object to touch an individual, saliva, his own [spittle] to touch the face of Officer Hansen.

"As the Court mentioned to you also in the reading of the instructions, this touching on this battery, as you will see in the other charge, does not have to cause any injury. It does not have to cause any pain to another individual. It simply is something that had to have been accomplished in a rude or angry manner and is offensive to the person who is touched.

"The second charge is what is entitled a battery by gassing. And this is a specific crime that deals with the contact, the touching of another individual with a bodily substance or a bodily fluid. It's reserved for the type of conduct where someone has spit onto the skin of another individual, someone has thrown urine onto the body and skin of another individual, feces – fecal matter. This is what this type of crime addresses. Blood, et cetera.

"In this particular instance, the evidence must demonstrate that the Defendant intentionally caused to be placed or thrown on the body of an employee of a State prison, which Officer Hansen testified he was at the time, human bodily fluids or substances.

"And in contrast to the first charge or crime that is alleged which deals with the touching directly or indirectly of another person, this particular crime requires the People to establish that the bodily fluids had actual contact with the skin or membranes of an individual, and that indeed the substance was a human bodily fluid or substance.

"So, you can see those two elements differ from the first crime of battery . . . that I have just described to you.

"These two charges . . . are charged in the alternative, and the distinction I pointed out to you deals with some specific conduct. The battery by a prisoner on a non-prisoner is a bit more general.

"If for any reason during the course of this particular trial the People have failed to establish that perhaps the bodily fluid was not that, that it was something else, or didn't establish perhaps it was bodily fluid but did not have contact with the skin of Officer Hansen, it is in that situation that you could look to count 1 as distinguished from Count 2, a battery by gassing, and see that those particular specific elements do not have to be established, but would suffice and be sufficient to find the Defendant guilty of Count 1, which is battery by a prisoner on a non-prisoner."

Defendant does not contest the correctness of the court's instruction, and he did not object to the prosecutor's argument below. However, he now contends that the argument distorted the elements of battery and "likely . . . led the jury to believe that it could convict [defendant] of battery even if it found that he did not intentionally spit on Officer Hanse[n]." "The prosecutor's argument so diluted the 'willful' aspect of battery that it allowed a conviction for unintentional conduct. Given the facts of this case, the standard instructions on battery when coupled by the prosecutor's misleading argument, allowed the jury to convict [defendant] for unintentional conduct."

The People contend that the instruction and the prosecutor's argument did not permit conviction of battery for unintentional conduct. "Neither the court's instructions on battery, nor the prosecutor's argument, advised the jury that criminal intent was unnecessary for battery." We agree with the People.

Instructions that are not erroneous, deficient, or misleading on their face, may become so in particular circumstances. (*People v. Brown* (1988) 45 Cal.3d 1247, 1256.) When an appellate court must determine "whether the interplay of argument with individually proper instructions produced a distorted meaning, it [is] appropriate to evaluate the remarks of both counsel to determine whether the jury received adequate information." (*Ibid*.)

Here, the court's instruction expressly advised the jury that to find defendant guilty of the charge in count 1, it had to find that defendant willfully, or intentionally,

touched Officer Hansen. The prosecutor argued that the touching must be willfully accomplished. And, defense counsel made it clear that the jury had to find a willful touching to find defendant guilty of either offense: "What is important in this case, and I don't think it takes a nuclear scientist or anybody else to figure out what the issue is in this case – and I'll put it in a nutshell for you – and that is whether or not the prosecution has proven whether or not [defendant] willfully, purposefully spat on Officer Hansen. That's the issue. That element is present in both of these charges. Okay." On this record, we conclude that the jury was not misinformed or misled to believe that it could convict defendant of battery even if it found that he did not intentionally touch, either directly or indirectly, Officer Hansen.

Sentencing

At the start of the sentencing hearing, the court stated that it had read and reviewed the People's sentencing recommendation, defendant's motion for new trial and request to strike the prison priors, and the People's response to that motion.[2] After the court denied defendant's request to strike the six prison priors, defendant's counsel argued that the conduct underlying defendant's conviction "should warrant the lower term of two years." The court responded: "All right. I think that being spit on versus being hit in the face and getting your nose broken are significantly different as far as the outcome. But I think getting spit on can carry with it even more hazards that having your nose broken by a punch in the face based on the possibility of transference of communicable diseases. [¶] Having reviewed the information in this case and considering looking at the Rules of Court, contemplating factors in aggravation and mitigation, I don't see anything mitigating essentially or aggravating about the case. . . . I think the midterm is appropriate." The court sentenced defendant by doubling the middle term of three years

[2] As defendant was not eligible for probation, the probation department reported defendant's custody credits but did not prepare a formal presentence probation report.

and adding six consecutive years for the prison priors, for a total term of 12 years. When the court asked defense counsel for his comments, counsel stated only that "I would like to for the record object to the length of sentence as being unreasonable."

Defendant now contends that the trial court erred in selecting the middle term. He argues that the court relied on an improper factor in aggravation and "ignored relevant factors in mitigation, which may have, if properly considered, outweighed any aggravating factors which the court might have considered when deciding on the prison sentence to impose, thereby warranting imposition of the low term." The People contend that defendant has forfeited his claim by failing to raise an objection to the court's statement of reasons for its sentencing choice, and that the court was not required to state which aggravating and mitigating factors it considered and weighed before selecting the middle term.

"[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 356.) "[C]laims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Id*. at p. 354.) "Our reasoning is practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id*. at p. 353; *People v. Davis* (1995) 10 Cal.4th 463, 551-552.) As defendant did not object below to the trial court's statement of reasons for selecting the middle term, defendant has waived any error on appeal. (*Scott, supra*, 9 Cal.4th at p. 356.)

DISPOSITION

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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DUFFY, J.